No. 82-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LONG ISLAND UNIVERSITY,

Petitioner,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND RESPECTING CERTIORARI

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Respondents Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF")[1] believe that a Writ of Certiorari should issue to

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1 Pursuant to Rule 28.1 of this Court, TIAA-CREF state as follows: (1) *Parents.* All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York membership corporation. CREF itself is a not-for-profit, non-stock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates.* TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

review the Judgment and Opinion of the Second Circuit Court of Appeals entered herein on September 29, 1982. *Spirt* v. *Teachers Insurance and Annuity Association*, 691 F.2d 1054 (2d Cir. 1982). TIAA-CREF have already filed a Petition seeking review of the Second Circuit's decision, 51 U.S.L.W. 3394 (U.S. November 9, 1982) (No. 82-791), and their views respecting the issues raised by that decision are fully set forth therein. Petitioner Long Island University ("LIU") here requests a much more limited review of the Second Circuit's decision than that sought by TIAA-CREF. TIAA-CREF believe the scope of LIU's Petition to be too narrow, and that the questions deserving of review are those set forth in its own Petition for Certiorari.

For example, the Second Circuit's decision respecting the applicability here of the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.* (1976)) ("the Act")[2] is not a "subsidiary" issue much less an "eminently correct" determination. (LIU Pet. p. 11). As noted in TIAA-CREF's Petition in *Spirt* (pp. 19-21), the Court below has, by its decision on that issue, redefined the clear words of the Act, severely limited its scope, and substituted confusion where clarity formerly existed.

By holding that the words "No act of Congress" in the statute were "primarily" meant to apply to the federal antitrust laws and were not intended to include "subsequently enacted civil rights legislation" (691 F.2d at 1065), the Court has made a wholesale revision of the plain meaning of the Act. Insurers, such as TIAA and CREF,

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2 Section 1012(b) of the Act in pertinent part provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

can no longer be confident that, once engaged in the business of insurance and acting in accordance with state insurance law, they will not also now be subject to a variety of federal legislation enacted since 1945 which might arguably apply to their insurance activities. Such a major re-writing of the Act should not go unreviewed by this Court.

That the McCarran-Ferguson issue is an important one deserving of review by this Court is also clearly demonstrated by the presence here as a party of Albert B. Lewis, Superintendent of Insurance of the State of New York. Both plaintiff below and the Equal Employment Opportunity Commission have sued Superintendent Lewis by reason of his rejection, as inconsistent with New York law, of a merged-gender ("unisex") mortality table proposed for prospective use by TIAA-CREF. A direct federal-state conflict thus exists over the regulation of the "business of insurance," a conflict which the Act was meant to resolve. The McCarran-Ferguson issue is both important and dispositive and should be examined by this Court, not ignored as LIU suggests.

Further, the question of Title VII's applicability to third-party insurers such as TIAA-CREF, who are neither employers nor agents of employers as required by that statute, is hardly a subsidiary issue or a mere question of fact. (LIU Pet. p. 12). Here, the Second Circuit's decision that TIAA-CREF, though not plaintiff's employer "in any commonly understood sense," 691 F.2d at 1063, were nonetheless subject to Title VII as if they *did* employ their annuitants, presents important questions of statutory construction. TIAA-CREF's contention that they are not here employers within the meaning of Title VII is underscored by this Court's statement in *Los Angeles Department of Water & Power* v. *Manhart,* 435 U.S. 702, 718 n. 33 (1978), that "Title VII and the Equal Pay Act

primarily govern relations between employees and their employer, not between employees and third parties." *See* TIAA-CREF's Petition pp. 16-17.

The Sixth Circuit in *Peters* v. *Wayne State University*, 691 F.2d 235, 238 (1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. November 10, 1982) (No. 82-794), found the District Court's decision that TIAA-CREF were "employers" to be "clearly erroneous." Far from being "not necessary" (LIU Pet. p. 11) to the *Peters* decision, that holding was compelled by that Court's stated desire to prevent the "revolutioniz[ing of] the insurance and pension industries" which this Court sought to avoid in *Manhart*. *Id.* This issue, too, should be examined by this Court and the conflict between the Second and Sixth Circuits resolved.

Petitioner also argues that the relief granted by the Second Circuit was within its discretion and wholly consistent with *Manhart's* warnings against the imposition of retroactive relief. TIAA-CREF disagree with both assertions for the reasons stated in their Petition (pp. 17-19). Petitioners, in arguing (Pet. p. 12) that the decision below "would not affect . . . the TIAA-CREF funds," avoid discussing the impact of the relief granted on TIAA-CREF's male constituents. The Second Circuit has ordered that a portion of the benefits due to men, resulting from their past contributions, be given to women in order to equalize periodic benefit rates. This reduction in men's benefits is thus clearly retroactive. The impact of the transfer of males' lifetime benefits to women—in the amount of some $2 billion—is, contrary to the Second Circuit's decision, 691 F.2d at 1068, a "drastic" award. The question of retroactive relief also merits review by this Court.

Finally, TIAA-CREF agree with Petitioner that a decision in *Arizona Governing Committee, et al.* v. *Norris*,

cert. granted, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52), cannot reasonably be expected to resolve the significant and difficult issues present here, but not in *Norris. See* TIAA-CREF Pet. pp. 11-13. Issues such as an insurer's justification for the use of sex-distinct mortality tables, the proper application in these circumstances of the McCarran-Ferguson Act, and the propriety of the grant of retroactive relief herein should, rather, be briefed, argued, and decided on the basis of the trial court record made below and not left for determination in light of *Norris'* more limited scope.

Conclusion

For all the foregoing reasons, as well as those contained in their own Petition, TIAA-CREF urge this Court to grant certiorari in this action to review the questions presented in TIAA-CREF's previously filed Petition.

Respectfully submitted,

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